DOCUMENT RESUME

ED 224 290 FL 013 275

AUTHOR Santana, Raymond A. Nava
TITLE Legal Theory in Support of Bilingual Education.
PUB DATE 82
NOTE 39p.; Paper presented at the Annual Meeting of the American Educational Research Association (New York, NY, March 22, 1982).
PUB TYPE Speeches/Conference Papers (150) -- Reports - Descriptive (141) -- Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Bilingual Education; Civil Rights; *Educational Policy; Elementary Secondary Education; *Federal Legislation; *Limited English Speaking; Minority Groups; Social Discrimination; *State Legislation
IDENTIFIERS Brown v Board of Education; Lau v Nichols

ABSTRACT

A review of the national and state legislation dealing with bilingual education is presented in the context of an introductory history of the bilingual movement in the United States. This history falls into two periods; the first from 1840-1920, and the second from 1960 to the present. The goal of bilingual education, to teach English without sacrificing the home language and culture, is the backdrop for the examination of the laws governing it. First, federal bilingual policy mechanisms are examined from the initial constitutional mandate resulting from the Brown v. Board of Education case to action of the Reagan administration in 1981 withdrawing proposed Lau regulations. In each case the legislation is criticized in terms of its impact on equal educational opportunity for limited English speaking minority children. Following this section, the response of the Los Angeles Unified School District to the 1974 Supreme Court decision in the Lau case is presented and an outline of major deficiencies existing in Los Angeles as of 1980 are discussed. A fourth section describes California's bilingual/bicultural education program and the policy mechanisms that support it. The final section is a review of court actions in Los Angeles and Judge Egly's orders in 1980 on proposed programs for segregated and racially isolated minority schools. (AMH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED224290

LEGAL THEORY IN SUPPORT OF BILINGUAL EDUCATION

Raymond A. Nava Santana
Deputy Public Defender
Los Angeles County

FL013275

Paper delivered at the Annual Meeting of the
American Educational Research Association
New York City, March 22, 1982

(Originally prepared as a report to the LAUSD School Monitoring Committee appointed by the Honorable Judge Paul Egly)

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Raymond A. N. Santana
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

The history of bilingual education in the United States falls into two distinct periods. The first was from 1840 - 1920, and the second from 1960 to the present. From 1840 to 1880, German was the only Non-English language permitted as the primary language of instruction on a wide scale basis. There were instances of French being used as the language of instruction in Louisiana and Spanish in the Southwest from 1848 - 1870. During this same period, there were bilingual (German-English) schools in Cincinnati and bilingual (Spanish-English) schools in the Southwest.

It should be pointed out that before 1800 there were schools in which English was not the primary language of instruction. These schools were non-public (mostly Catholic) and the language of instruction was mainly German with some French, Scandinavian and Dutch. They were not bilingual because English was taught as a separate subject as opposed to being taught as a second language of instruction.

After 1880 numerous parochial schools, predominantly Catholic with some Jewish, were founded for children with eastern and southern European backgrounds; Asians on the west coast had private afternoon schools where there was bilingual instruction after 1880 to the present.[1]

After the Mexican American War, the 1848 Treaty of Guadalupe Hidalgo mandated that former Mexican citizens in the territories taken by the United States had the legal right to retain their language in both private and public schools.[2]

These rights guaranteed under the Treaty of Guadalupe Hidalgo were to include that all publications, governmental bodies and schools were to be bilingual (English and Spanish). In California, for example, the Constitution of 1849 was printed in Spanish and English and provided in Article XI, Section 1, that "All laws, decrees, regulations and provisions which from their nature required publications shall be published in English and Spanish".[3] The section of this treaty dealing with public schools was not implemented. In fact, after California became a state in 1870, a statute was passed that required that "all schools shall be taught in the English language".[4] The entire issue of whether there existed legally binding cultural and linguistic guarantees in this treaty has been a disputed fact by American historians.

The arrival of thousands of Cuban exiles in the contemporary period of the 1960's originally motivated the creation of the present bilingual and bicultural education programs in the United States. Programs varied widely; in many instances instruction was contrary to stated objectives. Few of the original programs were truly bilingual. Under the guise of biculturalism, Spanish language materials often were verbatim translations of English language materials.[5]

Predicated on a monolingual mode of instruction utilizing English, the public schools have not offered optimal educational opportunities to Limited-English-Proficient students. The curriculum of the public schools has been tailored to the culture of the Anglo[6] English-speaking student. The schools have not provided the opportunity for Limited-English-Proficient students to acquire basic skills in the home languages while they are learning English. This policy of using English exclusively in California

and other states in this nation must be viewed as a definite policy which has negatively impacted the educational growth of the Limited-English-Proficient / Non-English-Proficient student.

This is especially true in the case of linguistic minorities who enter the public schools with limited English proficiency. Frequently students have been assigned to special education classes for the educable mentally retarded. As a result, class action lawsuits have been brought against the school district for this practice. In one such case,[7] a class of nine Mexican Americans of elementary school age sought relief because they had been classified educable mentally retarded. The children were retested in Spanish and seven out of nine received higher scores and reclassified due to their improvement. At present schools are avoiding the special education needs of students because they fear legal action against them.

The proximity of many hispanic communities in the Southwest to the Mexican border insures that their Spanish linguistic links will continue. These children as well as other linguistic minorities in the public schools have not been reinforced in their primary language and culture. In this country they are often perceived as culturally deprived, disadvantaged and handicapped.[8] These perceptions had the impact of lowering students' self concept,[9] and provided the rights and the rationale for bilingual education. Bilingual methodology demanded that the language and culture of the Limited-English-Proficient student be utilized and recognized in the educational process. Under a bilingual approach a Limited-English-Proficient student can acquire learning skills and basic academic skills in the home language while being exposed to

English as a second language of English language development. The goal of this methodology is first to provide the student with academic skills in the home language necessary to make the appropriate transfer to English-only instruction.

The goal of bilingual education is to teach English without sacrificing the home language. However, the traditional approach -- exclusive English as a second language -- ignores an existing educational resource, the child's skills in his dominant language. Consequently, the culture of the non-English speaking students and especially their language is totally rejected and denigrated. It should be noted that English as a second language and English language development are a component of every bilingual instructional program.

English as a second language teaches the students needed academic skills while they acquire English in a natural setting sequence.

Let us now continue by examining the laws that govern bilingual education.

II. FEDERAL BILINGUAL POLICY MECHANISMS

The social and legal struggles of Blacks for a desegregated education opened the way for the parallel issue of whether equal access to education for the non-English-speaking student would be achieved. Twenty years ago the United States established a constitutional mandate of equal educational opportunity when it declared in Brown v. Board of Education[11] that "the opportunity of an education...where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

Bilingual and bicultural education emerged again as a significant socio-educational and legal issue by the late 1960's. In response to the specific need of non-English-speaking students, Congress conducted hearings on bilingual education.[12] Based on the findings of these hearings, Congress approved the Bilingual Education Act which was signed into law as Title VII of the Elementary and Secondary Education Act of 1965.[13] Under this federal statute a bilingual program is defined by Congress as:

> "a program of instruction, designed for children of limited English proficiency in elementary or secondary schools, in which, with respect to the years of study to which such program is applicable---(1) There is instruction given in, and study of, English and, to the extent necessary to allow a child to achieve competence in the English language, the native language of the child of limited English proficiency, and such instruction is given with appreciation for the cultural heritage of such children, and of other children in American Society, and with respect to elementary and secondary school instruction shall, to the extent necessary, be in all courses or subjects of study which will allow a child to progress effectively through the educational system."[14]

In line with these objectives, this Act allocates aid to local educational agencies to develop materials on the Limited-English-Proficient student's history and culture. It encourages community involvement and participation through the creation of parent advisory councils.[15] Programs, moreover, under this Act may not be segregated. Hence, in no way will the provisions of this act violate a court order to desegregate. This program specifically provides that:

> "In order to prevent the segregation of children on the basis of national origin in programs assisted under this title, and in order to broaden the understanding of children about languages and cultural heritages other than their own, a bilingual program may include the participation of children whose language

is English, but in no event shall the percentage of such children exceed 40 per centum."[16]

In order to receive these funds a state official must voluntarily apply.[17] Enforcement of this statute is limited to a situation where the state requires an official to apply.

Another Federal statutory program impacting bilingual education is Title I of the Elementary and Secondary School Act of 1965, as amended,[18] the general provision for compensatory education in this country. This program's monies indirectly reach bilingual programs in the states, insofar as the non-English-speaking students meet the additional requirements of this act. These funds are designated to assist students with special educational needs, such as those students living in school attendance zones having a high concentration of children from low income families,[19] American Indian students,[20] migrant children,[21] handicapped children,[22] and those children neglected and delinquent.[23]

These Federal funds exist to supplement state funds in these specialized areas. As such, they are administered by the states, and there is no overal national data on these federal monies and bilingual education. Given that many Title VII students are covered under the specialized areas of Title I, there may be a greater need in the future to coordinate implementation in order to prevent mismanagement, unnecessary duplication of services, and abuse on the local level.

Under the 1978 Amendments of Title I,[24] there is a new provision that allows the continuation of a student's eligibility under its program fro educationally deprived children if the students are transferred to an ineligible area or school in the same year. Eligible Title I students

who are bused to a non-Title I school may still be allowed to receive additional government funded programs if their local agency so determines. Hence, eligible Title I area students should not be penalized for being bused to a non-Title I area.

In addition, the new amendments to Title I provide a comparability of services section.[25] One section mandates that the public school's basic program be provided to all students at a school. This is to insure that Title I students are not excluded from a school's regular program or other categorical projects. For example, Title I programs must supplement and not supplant Title VII programs in a student's own school or in a school receiving Title I students.

Title VI of the Civil Rights Act of 1964,[26] has been the strongest statutory legal ground for bilingual education thus far. Pursuant to Section 601 of the Act, the U.S. Department of Health, Education, and Welfare (hereinafter H.E.W.) in 1968 issued a guideline stating "school systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system."[27] Based on the unique problems of non-English-speaking students and addressing the need for linguistically adequate education, H.E.W. issued its crucial May 25, 1970 Memorandum which stated:

> "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."[28]

H.E.W.'s authority to mandate such guidelines was later upheld by the U.S. Supreme Court in the landmark case of Lau v. Nichols.[29] The Supreme Court held in a decision written by Justice Douglas that a school system's failure to provide English language instruction to approximately 1,800 students who did not speak English, or to provide them with adequate instructional procedures, denied them a meaningful opportunity to participate in the public educational process. It specifically held that such action by a school district violates Section 601 of the Civil Rights Act of 1964. This Section of the Act bans discrimination based "on the ground of race, color, or national origin, in any program or activity receiving Federal financial assistance."[30] This decision also upheld H.E.W.'s authority under Section 602[31] to mandate guidelines that insure that recipients of federal aid conduct any federally-financed projects consistently with Section 601.

The decision in Lau was limited in its approach. First, the legal foundation of the decision rests on the Supreme Court's interpretation of Title VI of the Civil Rights Act of 1964. It prohibits discrimination on the basis of national origin, which includes language, only where a school district has contractually agreed to abide to Title VI by its acceptance of federal monies. Consequently, the Supreme Court did not find a constitutional right to bilingual education, but only a statutory entitlement where federal funds are received. Secondly, educationally the Supreme Court puts is focus on a paradigm which places bilingual education within the framework of compensatory education along with other programs for the "culturally disadvantaged". Thus, it did not view bilingual education as an independently positive educational experience.

The decision was an attempt to deal with the issue of Limited-English-Proficient students' access to equal educational opportunities. The Court did not have the benefit of appropriate information regarding the theory and foundations of bilingual methodology and the findings of current research in this area.

Finally, in Lau v. Nichols[32] no specific remedies were recommended:

> "No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instruction to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation."[33]

Perhaps the Court failed to note that the Board of Education might not have had the required expertise to apply to the problem and thus rectify the situation. Therefore, Lau offers a great deal of discretion to the individual districts as to their approach in fashioning bilingual programs under this decision. H.E.W. in 1975 established a policy document which became known as the Lau Remedies.[34]

In this document, H.E.W. set forth several alternatives: A Transitional Bilingual Education Program; a Bilingual/Bicultural Program; and a Multilingual/Multicultural Program.[35] These programs all provided for a cultural component and in this manner extend Lau which dealt only with linguistic problems. While the cultural component of bilingual education is rejected by many conservative educators, the component strengthens positive cultural self-awareness of the non-English-speaking student and thereby supplements the adoption of Anglo cultural norms. The cultural component of bilingual instructional programs serves a dual purpose. First, it enhances the student's self-esteem since his/her

culture is recognized in a positive manner. Secondly, the positive use of non-Anglo culture in the classroom promotes cross-cultural understanding between all ethnic and language groups within the context of American society. Students participating in these programs potentially could have improved academic skills and citizenship due to their exposure to more than one language and one culture.

In response to the void created by the Lau decision vis-a-vis specific bilingual education requirements, the Federal Government's newly-created Department of Education released draft regulations on this subject on August 5, 1980.[36] They affirmed governmental support for bilingual education, despite certain deficiencies. For example, they provided no special help for Limited-English-Proficient students who are dominant in English, and only "good faith" assistance was required by school officials in order to meet the need of non-English-speaking high school students. Moreover, a qualified bilingual teacher needed only to have "considerable proficiency", this standard was not delineated. Students also could be allowed to exit if they scored 30% on the reading subpart of an English achievement test. This extremely low score now is used to determine if a student needs compensatory education. Further, non-English speaking parents were allowed to opt their children out of the program orally, thus giving no guarantee of informed written consent. Such provisions may allow abuse by school administrators unsympathetic to bilingual education. (This is especially alarming in light of the fact that a bilingual program was itself triggered by having 25 students in two consecutive classes who have not decided to opt out.) Finally, the

Secretary of Education could waive any provision of these regulations by an application for such a waiver by a school district. It is interesting to note that the proposed regulations were intensely criticized by both proponents and opponents of bilingual instruction during public hearings held in the fall of 1980.

The new Reagan Administration on February 2, 1981, withdrew the proposed Lau regulations on the grounds that they were too costly and unworkable.[37] According to Thomas Lopez, Assistant Chief of the Bilingual Education Office in California, the 1975 guidelines issued by the Federal Government will continue to govern.[38] This act by the Reagan Administration appears more a symbolic slap in the face of bilingual education in light of the above-mentioned inherent weaknesses of the proposed regulations.

Subsequent to Lau, the Supreme Court in Keyes v. School District No. 1 Denver Colo.,[39] for the first time upheld a district decision that placed Hispanic students under a broader category of minority. This was most significant in that historical discrimination against Chicanos was conscusively presumed. It also allowed in other cities with multi-ethnic populations that a third group could be considered due to its numerically significant population.

In a later decision in this same case, the Tenth Circuit Federal Court of Appeals[40] established that bilingual education was not a substitute must take precedence.[41] But, the Federal Court also ordered that a meaningful desegregation plan had to assist Non-English-Proficient students, in this case Hispanics, to reach the proficiency in English necessary to learn other basic subjects. On remand to the lower District

Court, it ordered that the district clarify the needs of Limited-English-Proficient children, and once identified that programs be established.[42]

Another statutory basis for bilingual education is Title II of the Equal Educational Opportunities Act of 1974 (hereinafter E.E.O.A.). The Act provides that "no state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin..."[43] Moreover, it specifically identifies as discriminatory "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program.[44] Hence, this Act clearly requires assistance to non-English-speaking students even when their need for such assistance is not the result of intentional discrimination.[45]

Based on current Supreme Court rulings there is discussion that Title VI may not have intended to require school districts to remedy discriminatory impact not caused intentionally, making it co-extensive with U.S. constitutional requirements under the Fourteenth Amendment's "Equal Protection" Clause.[46] However, the evolution of the E.E.O.A. indicates intent to create new substantive rights for those subject to discrimination.

In proposing the legislation, the presidential message accompanying it stated:

> "School authorities must take appropriate action to overcome whatever language barrier might exist, in order to enable all students to participate equally in educational programs this would establish in effect, an educational bill of rights for Mexican-Americans, Puerto Ricans, Indians, and others who start under language handicaps, and insure at last they too would have equal opportunity."[47]

What the presidential message and the court ruling noted herein failed to

take into account is that possibly school authorities were not themselves prepared or trained to overcome whatever language barriers might exist.

E.E.O.A. allows the school districts to determine what is appropriate action.[48] However, just any course of conduct is not permitted. If this Act is to be a viable educational Bill of Rights, it must provide effective answers to learning barriers caused by language differences. The Act was not instituted to allow school officials to go through a meaningless charade that does not create positive results. In three recent cases involving claims dealing with bilingual education, the courts ordered more effective programs despite well-intentioned but inadequate state programs.[49]

Title VI of the Elementary and Secondary Education Act of 1965 as amended is the Emergency School Aid Act.[50] This Act deals with bilingual education by providing funds for special projects. The purpose of this Act is to prevent minority group isolation and improve the quality of education for all children.[51] Additional financial assistance under the Act is provided to meet the special needs incident to the elimination of minority group segregation/discrimination among students and faculty in elementary and secondary schools.[52] The Act also encourages the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students.[53]

The regulations under the Emergency School Aid Act are very specific as compared to other federal mandates. They do not allow segregation of minority students for more than twenty-five percent of the day unless the

segregation is based upon bona fide ability grouping. This grouping must measure English skills not utilized with national origin minority group children.[54] These regulations also prohibit discrimination on the basis of language or culture, thus prohibiting segregated bilingual education.[55]

III. LOCAL RESPONSE TO FEDERAL MANDATES

The Los Angeles Unified School District developed a Lau Plan in response to the January 1974 Supreme Court decision in this case. The Lau steering committee was formed on April 7, 1978, to draft the plan with input from community representatives, teachers and administrators. The Lau task force was formed with representation from various district offices to prepare the District Plan and was comprised of seven working committees: Assessment and Evaluation, Elementary Program, Secondary Program, Community Involvement, Staff Development, Special Education, and Counseling Psychological Services. The Plan was approved by the Los Angeles Board of Education on May 30, 1978, and has been expanded and modified since then in accordance with its procedures.[56]

Under the District Plan students will be designated "Lau students" when their home language is other than English and they are identified as non-English-speaking, or are identified as limited-English-speaking, or are identified as functional-English-speaking and are shown to be under-achieving in basic academic skills.[57] The procedures for identifying Lau students are twofold: (1) Parents of students in K-12 are surveyed; (2) Students coming from a home where a language other than

English is spoken are surveyed utilizing the "Basic Inventory of Natural Language" Exam (hereinafter BINL). This exam categorizes students into four categories: (a) non-English-speaking, (b) limited-English-speaking, (c) functional-English-speaking, and (d) proficient-English-speaking. The academic achievement of those students identified as functional-English-speaking is assessed. It should be noted that the BINL has been reviewed by the California State Department of Education and has been found to be inadequate. It is no longer recommended by the State for the purpose of language proficiency assessment, and other more appropriate instruments will be recommended in the near future.

The Los Angeles Unified School District goals for bilingual programs for non- and limited-English-speaking pupils under the Lau Mandate are as follows:

> "The District is committed to provide viable programs of instruction for all of its pupils. A portion of these pupils come from homes where a language other than English is or was spoken as identified by the Home Language Survey. These students may be referred as Lau students. Lau students fall into two categories: 1. Non- or limited-English speakers, or 2. Functional-English speakers experiencing under-achievement in basic academic skills. The District goal consistent with State and Federal mandates for non- and limited-English speakers is to: 1. Have each pupil become proficient in the use of English. 2. Utilize the language the pupil best understands to insure that the pupil will develop basic skills and concepts normal for his age and grade until such time as the pupil has acquired the English skills and concepts through the use of English only. 3. Highlight the culture of the pupil who is participating in the program. The District goal, consistent with State and Federal mandates for under-achieving functional English speakers from homes where a language other than English is spoken, is the same as it is for all under-achieving pupils."58

The development and implementation of a Lau plan acceptable under

Federal mandates was one condition precedent to certification that the District was eligible for federal funds. The District in its statement of understanding admitted that on July 20, 1977, the H.E.W. Office of Civil Rights, hereinafter OCR, sent to the District a letter of finding alleging a failure of the District to fulfill Title VI responsibilities.[59] Consequently, on September 7, 1977, H.E.W.'s Office of Education advised the District that absent a remedial plan it was not eligible for Emergency School Aid Act monies for the 1977-1978 funding cycle. It must be noted that the Office of Civil Rights has rated the Los Angeles Unified School District as the worst district in the country in meeting the needs under federal guidelines of its bilingual students.[60]

Data provided OCR in 1980 indicated some of the major deficiencies that existed in Los Angeles were: 1) many teachers in the District's designated classroom at the elementary level did not have a state certificate nor a state waiver, 2) many uncredentialed bilingual teachers did not have bilingual aides, 3) many students at schools were on Bilingual Individual Learning Plans, even though enough non-English-speaking or limited-English-speaking students for the organization of classes existed, 4) many non-English-speaking or limited-English-speaking students in a student integration program have not been provided with special assistance to which they are entitled at either the sending or receiving schools, 5) the District continues to assign teachers of demonstrated bilingual capability to schools and classrooms enrolling few, if any, non-English-speaking or limited-English-speaking students from the teacher language background, 6) the District has failed to assign bilingual teachers, who are employed by the District but are not being used in bilingual programs to schools

where non-English-speaking or limited-English-speaking students are unserved or minimally served, 7) the District has not implemented procedures sufficient to assure that all teachers assigned to desegregated bilingual classrooms have a bilingual credential or waiver, 8) the District has not taken steps to assure that its Lau plan is fully implemented despite documented deficiencies, and 9) the District has not improved a reporting and recording system to evaluate its Lau plan implementation.[61]

Students who are not being taught by qualified teachers are receiving inadequate instruction. The de facto teacher in many cases is a teacher's aide who is not trained to give instruction and yet has been given this responsibility. Consequently, students are not given adequate structured instruction in substantive academic areas. This is because the teachers' aides do not have the requisite subject-matter training or organizational training to develop the curriculum required by these limited-English-proficient students.

IV. STATE BILINGUAL POLICY MECHANISMS

The Lau decision did not explicitly endorse bilingual education, but it was interpreted by the limited-English-proficient and educational community as a major step toward equal education opportunities through bilingual cross-cultural education. What it did do was promise the adoption by various state legislatures of local statutes mandating or allowing bilingual and bicultural instruction in public schools.

California's present bilingual/bicultural education program is predicated upon the Chacon 1972 Assembly Bill, AB 2284, which enacted the Bilingual Education Act of 1972.[62] This law required school districts to

undertake a census of non-English-speaking children and children of limited-English-speaking ability and to report the census results to the Department of Education. The Bilingual Education Act of 1972 authorized school districts to participate in a prescribed program of bilingual education involving parental and community participation. It was the purpose of the law to allow public schools of the State of California to choose to participate in establishing bilingual education programs. The primary goal of such programs was to provide positive reinforcement to the self image of participating children, and to develop intergroup and intercultural awareness among pupils, parents, and staff in participating school districts.

In 1976, subsequent to the Lau decision, California's legislature enacted a broader and more comprehensive bilingual law. This law arose out of Assembly bill 1329 which enacted the Chacon-Moscone Bilingual/ Bicultural Education Act of 1976.[63] Its purpose was to promote bilingual-crosscultural education programs in the public schools. The law required each school district, other than community college districts, to again undertake a census of the number of pupils of limited-English-speaking ability in the district and report its findings to the State Department of Education. Moreover, the bill requires each limited-English-speaking pupil, as defined, enrolled in the California public school system in kindergarten through grade 12 to receive instruction in a language understandable to the pupil which recognizes the pupil's primary language and teaches the pupil English.

The specific type of instruction or program a school district is required to provide would depend on the presence of a specified number of

non-English-speaking or limited-English-speaking pupils, as defined, in a school with the same primary language in the same grade level or with the same age group, in a multigrade or ungraded instructional environment.[64] The pupil's parent or guardian would have the right not to have their child or ward enrolled in such an educational program.[65]

This law requires periodic reports regarding the instruction.[66] It also mandates the establishment of school district advisory committees on bilingual education and requires the State Board of Education to adopt rules and regulations regarding their implementation.[67] The law requires teacher and teachers' aides to be fluent in the primary language of the limited-English-speaking pupils in order to be permitted to teach in any bilingual cross cultural program except where there is a shortage of qualified bilingual teachers or teachers' aides as specified.[68] The Commission for Teacher Preparation and Licensing was given one charge of credentialling bilingual teachers.[69]

Under this law, limited-English-speaking pupils are children who speak a language other than English in their home environment and who are less capable to perform schoolwork in English than in their primary language.[70] The term non-English-speaking pupils are pupils who communicate in their primary language only. Such children are unable to conduct basic conversations in English or take advantage from classroom instruction in English.[71] Hereinafter LEP will signify limited-English-speaking (limited-English-proficient), and NEP will designate non-English-speaking (non-English-proficient).

Moreover, elementary schools identifying ten or more LEP/NEP pupils with the same primary language at the same grade level or in the same age

group must offer those pupils bilingual instruction.[72] The district has the option of offering either (a) partial bilingual instruction in which listening, speaking, reading and writing skills are developed in both languages. Culture and history is taught in the language the pupil understands best; (b) full bilingual instruction in which basic language skills as well as culture and history are developed in both languages; or (c) bilingual/bicultural education in which two languages, including English, are used to promote competence in both languages. Those schools with ten or more NEP students or fifteen or more LEP students with the same primary language in the same grade level or in the same age group must provide them with either full bilingual instruction or bilingual/bicultural education. If a school has less than ten LEP/NEP pupils with the same primary language at the same grade level or in the same age group, it must provide these pupils with an individualized learning program.

This law required that certificated bilingual-cross-cultural teachers instruct in mandated bilingual programs.[73] Teachers with an internship credential or with an emergency bilingual-cross-cultural credential who are fluent both in English and in the primary language of the LEP/NEP pupils in their class may also instruct in bilingual programs. However, school districts lacking sufficient bilingual teachers may request a renewable one-year waiver from the State Board of Education for each teacher enrolled in a bilingual-cross-cultural class. Also, bilingual-cross-cultural instructional aides must provide classroom assistance to waivered teachers.[74] A recent amendment to the California Education Code mandates that only those teachers who had passed Part A (culture and history), Part B (methodology)

or Part C (language) of the competency requirement are eligibl to receive a waiver which under the prior law expired on September 1, 19[illegible]. Pursuant to new law effective immediately under AB 806, two-ye[illegible]aivers can now be obtained which are renewable until July 30, 1984.[76]

In line with desegregation considerations, this law manda[illegible]s that not more than two-thirds of the pupils enrolled in a bilingual cla[illegible] shall be LEP/NEP pupils. But if the school has higher than a[illegible]s enrollment of LEP/NEP pupils, the proportion of LEP/NEP pupils bilingual classroom may exceed the proportion of all LEP/NEP p[illegible]n the school by not more than ten percent.[77] Hence, a school which pupil enrollment of more than 80 percent can have a proportion pupils within the bilingual classroom not to exceed 90 percent. proportion of limited- and non-English-proficient students mus[illegible] maintained throughout the school year. These regulations req no significant disparities between achievement levels of Fluen Proficient pupils (hereinafter FEP) in bilingual programs and levels of all other FEP students exist. By requiring that FEP constitute one-third of the enrollment, the law requires that education should be offered in a linguistically-integrated set

The purpose of the new law, "The Bilingual Education Impr and Reform Act of 1980",[78] is to require California school dis offer bilingual learning opportunities to each LEP pupil enrol public schools. The primary goal of all programs is, as effec efficiently as possible, to develop in each child fluency in En The current law prescribes partial bilingual, full bilingual, a

cross-cultural programs for LEP pupils and NEP pupils. The new law deletes current provisions relating to partial bilingual and full bilingual programs and instead prescribes a basic bilingual program consisting of an English language development component and a primary language component for basic skills until the pupil makes a transition to English.[80] The target population under this new law is pupils who do not have the clearly developed English language skills of comprehension, speaking, reading, and writing necessary to receive instruction only in English.

The new law allows experimental bilingual programs which are either innovative or planned variation, which must meet prescribed criteria. The State Department of Education would be required to develop initial guidelines, criteria, and procedures for such programs.[81] All students identified as LEP must have their primary language reading, writing, speaking, and understanding skills assessed.[82] This new law also requires a secondary-level program and a secondary level individual learning program, as specified.[83]

Under the new law, school districts have different options in offering programs with different program content.[84] These are: (A) Basic bilingual education which includes (1) a structured English language development component with daily instruction leading to the acquisition of English proficiency including English reading and understanding skills, and (2) structured, daily primary language instruction in basic skills; (B) bilingual-bicultural education the goal of which is competency and includes (1) daily ESL and (2) primary language development in basic skills and selected subjects in both languages; and (C) experimental bilingual

programs which are of two types (1) innovative programs meeting the requirement of an (A) or (B) program and for which State Board of Education approval is not required unless waivers are required; or (2) planned variation programs designed for LEP students who appear to be more proficient in English. The number of classrooms implementing a planned variation program is limited to 150 classrooms. These classrooms must be approved by the State Board of Education to try alternative instructional approaches and as intensive ESL, modified immersion, etc. In these classrooms the bilingual teacher requirements could be partially or totally waived. Under this option, comparison classrooms must be identified for program evaluation. This is a significant alternative and loophole for districts in that they could get a waiver for an entire program. They must, however, provide the State Board of Education data that the district has an inadequate number of certified bilingual teachers, that existing bilingual teachers are not replaced, and that the present level of effort is not reduced. Option (D) is the secondary level program provision which encourages a secondary level language learning for grades 7-12. This program's purpose is to systematically develop the LEP high school pupils' learning skills.

The final two options focus in on students who are in an individual learning program. Option (E) is the secondary-level-individual-learning program of instruction which builds upon their language skills in order to develop proficiency in English. This program must be consistent with the Lau decision. The final option is the elementary level individual learning program. This program is an individualized version of the (A), (B) or (C) options listed above. In all the options, as a student's English skills increase more instruction shall be offered in English.

The numerical conditions triggering bilingual education occur in grades K-6 when there are ten or more LEP students of the same primary language at a grade level.[85] Consequently, the districts must offer an (A), (B) or (C) type program. Individual learning programs must be offered to all K-6 LEP students not in an (A), (B) or (C) type program. Regardless of numerical consideration, secondary students must be offered a (D) type language bilingual program or an (E) type one. This still would also require, to the extent federal and categorical aid funds are available, in cases where a school does not have ten pupils of limited-English-proficiency in the same grade level, but at least twenty such pupils in the school, one certified bilingual-cross-cultural teacher and one instruction program, and if the school has forty-five such pupils, the district must provide two certified cross-cultural teachers.[86]

The classroom composition requirements remain the same in an (A), (B) or (C) type program. In these programs not more than two-thirds nor less than one-third of those participating shall be LEP students. Again, fully English-proficient students should be achieving at the district norm.[87] The staffing requirements are that bilingual teachers are required for an (A) and (B) type program, and for a (C) type program unless waived by the state board. Districts receiving categorical aid funds must certify the availability of sufficient bilingual teachers and aides to implement (E) and (F) type programs.[88]

The new law creates a new teacher category of Language Development Specialist. This specialist is formally trained in the field of English language learning, second language acquisition and development, the structure of modern English, and basic principles of linguistics. The

teacher also must meet certain culture and methodology requirements. Moreover, this includes a teacher of English to speakers of other languages certificate from a commission approved teacher training institution of higher education. This meets the criteria established by the commission pursuant to the law[89] and shall be accepted in lieu of the methodology requirement.[90]

The assessment of student progress in basic skills for those pupils receiving a substantial amount of instruction in their primary language shall be conducted in that language. However, for those pupils receiving instruction in both English and the primary language, basic skills assessment shall be done in English. The assessment of language proficiency for all students will be done in English.[91] Under the new law, a school district could request a waiver of the requirement to teach reading and writing in an uncommon primary language.[92]

The issue of reclassification is addressed by the new law. At no time should exit be confused with reclassification. It is one thing to reclassify a student from LEP to FEP, but another is to exit him from bilingual instruction. It dictates that districts must establish reclassification criteria in accordance with state board regulations. The reclassification must include at a minimum 1) teacher evaluation of curriculum mastery; 2) assessment of language proficiency, oral and written; 3) parent opinion and consultation; 4) an empirically-established range of performance in basic skills based on the achievement of non-minority English proficient pupils.[93] This multi-criteria assessment approach insures that students are thoroughly evaluated and placed in regular classes when they are truly ready for English-only instruction.

Bilingual teacher waivers are, under the new law, renewable for four years and are issued until July 30, 1984, or until the fourth year the teacher is on a waiver. But, the following conditions must be met: 1) for the teacher just entering the program, no requirement; 2) for the teacher on a second year waiver, competence in language, culture, or methodology; 3) for the third year on waiver, no additional requirements; 4) for the fourth year on waiver, competence in two of the three required areas. Teachers on waivers must be assisted by a bilingual-cross-cultural aide.[94] There are no appropriations made by this Act, but certain requirements are predicated upon the receipt of categorical aid funds.

If parents want to pull their child out of a bilingual program, they have that right to opt out.[95] The district must notify the parents of potential participants in (A), (B), (C) or (D) type programs of their right to withdraw pupils from a program at the time of initial enrollment or at the close of any semester. If a LEP student is withdrawn from a bilingual program, an individual learning program must be developed and provided.

The community involvement section of the new law, like the old law, provides that each district with more than fifty pupils of limited-English-proficiency shall establish a district-wide advisory committee. Each school with more than twenty pupils of limited-English-proficiency shall establish a school level advisory committee. These committees will consist of parents, guardians, or both, in at least the same percentage as their children are represented in the school or district. Committees will have the duty to advise vis-a-vis the school's or district's master plan and as to needs assessments and the language census.[96]

California's funding for educational programs aimed at LEP/NEP students in California (together with funding for the state compensatory program) has been consolidated under the Economic Impact Aid Program. This funding package replaced the Educationally Disadvantaged Youth Program in July, 1979.[97] Funding is complemented by federal monies available through the Elementary and Secondary Education Act's Title I, Title VI, and Title VII discussed in a prior part of this report.

V. LOCAL BILINGUAL LAW IN LOS ANGELES UNDER JUDGE EGLY'S JULY 7, 1980 ORDER, AND HIS AUGUST 28, 1980 PENDITE LITE MINUTE ORDER ON PROPOSED PROGRAMS FOR SEGREGATED AND RACIALLY ISOLATED MINORITY SCHOOLS

The original complaint filed in 1963 by the parents of Mary Ellen Crawford and several others by the American Civil Liberties Union was brought in the Los Angeles Superior Court as a class action on behalf of all Black and Mexican American pupils against the Los Angeles City Board of Education. On February 11, 1970, the Superior Court Judge Alfred Gitelson ruled that the School District operated segregated schools and gave the initial order to integrate. Although the State Court in 1976 upheld the Los Angeles Superior Court but reversed a portion of the initial judgment which defined desegregation in specific racial/ethnic percentage.[98]

Under the Supreme Court order, the School District is required to take reasonable and feasible steps to alleviate the harms of segregation regardless of the cause and to demonstrate meaningful progress. The State Supreme Court shifted the jurisdiction back to the Los Angeles Superior Court. The Board did rot appeal this decision to United States Supreme Court.

On February 22, 1977, the Los Angeles Superior Court appointed Judge Paul Egly. On March 13, 1977, the Court began hearings on the District integration plan. On February 7, 1978, Judge Egly issued a minute order and allowed the District to implement its plan in September 1978 as a first step. He withheld final approval pending resolution of disputed matters. On July 7, 1980, Judge Egly handed down his order which rejected the Board's all voluntary program and called for the expansion of mandatory reassignments to grades 1-9 in September 1980 and to grades 1-12 by 1983. The District is to be divided into geographic sub-areas. This order has been appealed. The State Court of Appeals recently ruled in the District's favor, and this has been appealed by the plaintiffs to the State Supreme Court. The State Court of Appeals ruled in the District's favor in December, 1980, and this decision was appealed by the plaintiffs to the State Supreme Court. The State Supreme Court on March 18, 1981, left standing the State Court of Appeals ruling which vacated parts of Judge Egly's court order.* It specifically vacated his May 19, 1980 order, and his July 7, 1980 order. In the July order Judge Egly addressed the issue of bilingual education by specifically stating:

> "13. The court now adopts the present standards as set forth in Article 2 of Chapter 7 of the Education Code beginning with Section 52160 and continuing through Section 52179, with all the amendments now presently in force, as the standard for alleviation of minority students with a foreign language as their primary language. Any subsequent diluting of those standards which would provide less bilingual instruction in Los Angeles by reason of any act of Legislature shall not diminish this bilingual instruction requirement without further order of the court.
>
> "14. The respondent board shall develop its student assignment plans so as to cluster LEP/NEP students in the desegregation plan to insure that they are represented in sufficient numbers in the receiving

*App., 170 Cal. rptr., see p. 495, 510

school or in their home school as to require bilingual instruction under Chacon. Respondent shall make provisions so that LEP/NEP students are not assigned in individual classes primarily with lower achieving non-LEP/NEP students.

"15. The respondent shall semi-annually collect and publish a comprehensive collection of data on LEP/NEP bilingual teachers by grade level, pairs and clusters, areas and language so that pupils and teachers can be properly identified and placed.

"16. The respondent board shall, considering but not limiting itself to the remedies suggested by petitioners, formulate and adopt further remedies to enhance and accelerate the process of identification, training, remuneration and assignment of bilingual instructional personnel and it shall meet and confer and negotiate upon such remedies, as appropriate under the collective bargaining agreement, with intervenor United Teachers of Los Angeles (UTLA). Failing agreement, the court reserves jurisdiction to make such other and further orders as are necessary to alleviate the described harms to LEP/NEP students within the District.

"17. The board shall, in formulating all plans under this order, address the language needs LEP/NEP students, chronic overcrowding in Hispanic schools, and the segregation of Hispanic children as an indivisible set of problems, and shall propose plans which promise a comprehensive solution to all three."[99]

Paragraph 13 of the order is extremely significant. It not only states that the District must be bound by the current law, it also states that any subsequent amendment (which has now occurred) cannot diminish the District's responsibilities without further order of the court.

In order to determine whether this has occurred, it is crucial that the new law be examined to determine if it diminishes the school district's responsibilities.

The new law has the potential to diminish the school district's commitment to bilingual education. Specifically, the experimental program option for planned variation programs for LEP students who appear more proficient in English, despite the numerical limitations on the classes, could lead to abuses by the District, even though it is doubtful that Los Angeles will receive authorization for all 150 classrooms. One hundred fifty is the total number of such classes in the entire state. This is especially true since the teacher provisions may be waived entirely in this program. The Los Angeles School District's track record in providing bilingual education to meet the needs of its students is questionable based on data provided to OCR, an agency which has monitored the School District and was mentioned earlier in this report.

The tone of the new law reflects the spirit of compromise under which this new law was forged. The new law was part of a negotiated compromise that proponents and opponents of bilingual instruction in California agreed to in the 1980 legislative session. The idea was to grant school districts flexibility to try those methods of instruction which they feel are superior to bilingual instructional methodology. These methods then allow such districts to prove their methods meet LEP needs. Under federal guidelines the Los Angeles School District must take affirmative steps to rectify its non-English-speaking students' language deficiencies. The planned variation option under the new law must be monitored so that it is not abused by the District.

The August 28, 1980, Racially Isolated Minority Schools Order mandates that a Bilingual Teacher program is approved for implementation in 1980-81.[100] This program generally provides for an eleven percent

incentive for a fully credentialed bilingual teacher, and a five percent incentive for those that are working on their credential. The program is limited to racially isolated minority schools at 112 elementary, 12 junior, and 11 senior high schools in the District. The order is a positive step in alleviating the shortage of qualified bilingual teachers and provides needed monetary incentives for those teachers having these urgently-needed skills.

Notes and Historical Legal Chronology of Bilingual Education as it Appears in Section 1

[1] T. Anderson and M. Boyer, Bilingual Schooling in the United States, (1978), 2nd Edition, p. 48

[2] El Tratado de Guadalupe-Hidalgo (1848), pp. 22 and 24

[3] F. Thrope 1 American Chapters, Constitutions and Organic Law 404, (1909)

[4] Law of April 4, 1870, Ch. 556, Sec. 55 (1869-70) (Cal. Stats. 838) (Repealed 1955)

[5] Joshua Fishman and John Lovas, "Bilingual Education in Sociolinguistic Perspective", Tesol Quarterly, Vol. 4, No. 3, pp. 215-222.

[6] The term "Anglo" shall be utilized hereinafter in referring to Caucasians, i.e., those who are not members of any racial or ethnic minority identified as non-white.

[7] Diana v. State Bd. of Educ., Civil No. c-70-37 RFR (N.D. Cal. 1970) See also Larry P. v. Riles, 343 F. Supp 1306 (N.D. Cal. 1972).

[8] See, Stephen Baratz and Joan Baratz, "Early Childhood Intervention: The Social Science Base of Institutional Racism", Harvard Educational Review.

[9] Thomas Carter, "School Discrimination"; The Mexican American Case and Mexican Americans in School: "A History of Educational Neglect".

[10] Skip number 10 and continue with 11.

[11] 347 U.S. 438, 493 (1954) (Brown I).

[12] Hearing on S. 428 Before the Special Subcommittee on Bilingual Education of the Senate Committee of Labor and Public Welfare, 90th Congress, 1st Session at 52 (1967).

[13] 20 U.S.C.A. Section 3221, et seq. (1980 Supp.).

[14] Id. at Section 3223 (a) (4) (A).

[15] Id. at Section 3223 (4) (E).

[16] Id. at Section 3223 (4) (B).

[17] Id. at Section 3231.

[18] 20 U.S.C.A. 2701, et seq. (1980).

[19] Id. at Section 2732.

[20] Id. at Section 2711.

[21] Id. at Section 2761.

[22] Id. at Section 2771.

[23] Id. at Section 2781.

[24] Id. at Section 2733 (c) (1980 Supp.).

[25] Id. at Section 2736 (e) (1980 Supp.).

[26] 42 U.S.C. Section 2000D (1970).

[27] 33 C.F.R. Section 4955 (1968).

[28] 35 C.F.R. Section 11595

[29] 414 U.S. 563 (1974).

[30] 20 U.S.C.A. Section 2000d.

[31] 20 U.S.C.A. Section 2000d-1.

[32] 414 U.S. 563 (1974).

[33] Id. at 564-565.

[34] H.E.W. Task Force Finding Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols (Aug. 11, 1975).

[35] Id. at 6.

[36] Proposed Regulations to amend 34 C.F.R. 100, Federal Register Vol. 45, No. 152 (August 5, 1980).

[37] Los Angeles Times, February 3, 1981, Part I, p. 128.

[38] Id at 1.

[39] 413 U.S. 189, 197-198 (1973)

[40] 521 F.2d 465, 479 p. 13 (10th Cir. 1975). Cert. denied, 423 U.S. 1066 (1976).

[41] Id. at 480.

[42] Id. at 483. Also see, Serna v. Portales Municipal Schools, 10th Circuit, 499 F.2d 1147.

[43] 20 U.S.C.A. Section 1703.

[44] Id. at 1703 (f).

[45] United States v. Hinds County School Board, 560 V.2d 619, 623-24 (5th Cir. 1977).

[46] See, Washington v. Davis, 426 U.S. 229, 240 (1977), Personnel Administrator of Massachusetts v. Fenney, 442 U.S. 256, 272 (1979), and especially University of California Regents v. Bakke, 438 U.S. 265 (1978).

[47] 118 Congressional Record 8931 (1972).

[48] Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3, 587 F.2d 10022, 1080 (9th Cir. 1978).

[49] Rios v. Read, 480 F. Supp. 14 (1978), Clintron v. Brentwood Union Free School District, 455 F. Supp. 57 (1978), and U.S. v. Texas, Civil action No. 5281 Eastern District of Texas, Jan. 9, 1981.

[50] 20 U.S.C.A. 3191 (1980 Supp.).

[51] Id. at 3192 (a).

[52] Id. at 3192 (B) (1).

[53] Id. at 3192 (B) (2).

[54] 45 C.F.R. Section 185.43 (c) (1977).

[55] Id. Section 185.43 (d) (2).

Please note, these regulations have been amended and beginning fiscal year 1981 new regulations are in effect, see 45 C.F.R. Section 185, et seq. as amended Fed. Reg. Vol. 45, No. 97, May 16, 1980.

[56] Los Angeles Unified School District, Lau Year-End Report 1978-1979, Research and Evaluation Branc, Publication No. 371.

[57] Los Angeles Unified School District, Lau Plan, Chapter V, "Identification and Assessment of Students whose Home Language is Other than English", (May 25, 1978).

[58] Id. at p. ii

[59] Id. Chapter I Agreement, p. 2

[60] OCR 1978-79 Elementary and Secondary Civil Rights Survey. This survey was based on data collected from 6,069 of more than 16,000 districts nationwide.

[61] See Letter from Thomas K. Minter, Deputy Commissioner for Elementary and Secondary Education, Department of Health, Education and Welfare to Dr. William J. Johnston, Superintendent, Los Angeles Unified School District, February 28, 1980.

[62] California Education Code 52100 et. seq.

[63] California Education Code 52160 et. seq.

[64] Id. at Section 52165

[65] Id.

[66] Id. at Section 2171.6

[67] Id. at Section 52176

[68] Id. at Section 52166

[69] Id. at Section 52113

[70] Id. at Section 52102 (b)

[71] Id. at Section 52102 (c)

[72] Id. at Section 52165

[73] Id. at Section 52178

[74] Id. at Section 52178

[75] Id. at Section 44753.5

[76] Id. at Section 52178 as amended by AB806 Assembly State Senate August 31, 1980.

[77] Id. at Section 52167

[78] Unless otherwise noted, the provisions of this act will generally become effective July 1, 1981.

[79] California Education Code Section 52161 as amended instruction (effective July 1, 1981)

[80] Id. at Section 52163 effective January 1, 1981. Note: Guidelines for experimental programs shall be developed by State Education Department no later than March 1, 1981.

[81] Id. at Section 52162

[82] Id. at Section 52164.1

[83] Id. at Section 52163

[84] Id.

[85] Id. at Section 52165 (a) (1)

[86] Id. at Section 52165 (a) (2)

[87] Id. at Section 52167 effective January 1, 1981.

[88] Id. at Section 52166

[89] Id. at Section 52165

[90] Id. at Section 44253.5

[91] Id. at Section 52164.1

[92] Id. at Section 52163.6

[93] Id. at Section 52164.6 (effective January 1, 1981)

[94] Id. at Section 52178

[95] Id. at Section 92173

[96] Id. at Section 52176 (effective January 1, 1981)

[97] Joint Legislative Audit Committee, Office of the Auditor General, Report to the California Legislature on the Implementation of Bilingual Education in California (March 1958), p. 5

[98] Crawford v. Board of Education, 17 C.3d 280; 130 Cal Rptr 724, 551 P.2d 28 (1976).

[99] ORDER AFTER TRIAL UPON PLAN I AND THE PROPOSED ALL-VOLUNTARY PLAN, July 7, 1980, pages 6 and 7

[100] PENDENTE LITE MINUTE ORDER ON PROPOSED PROGRAMS FOR SEGREGATED AND RACIALLY ISOLATED MINORITY SCHOOLS, August 28, 1980.